United States Circuit Court of Appeals

For the Ninth Circuit

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, a corporation, et als,
Plaintiffs in Error,

vs.

BALLOU & WRIGHT, a corporation,
Defendant in Error.

Names and Addresses of the Attorneys of Record.

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The New York, New Haven & Hartford Railroad Company, a corporation; Boston & Maine Railroad, a corporation; Central New England Railway Company, a corporation; The New York Central & Hudson River Railroad Company, a corporation; The Michigan Central Railroad Company, a corporation; Erie Railroad Company, a corporation; Chicago & Erie Railroad Company, a corporation; The Canadian Pacific Railway Company, a corporation; The Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation; Spokane International Railway Company, a corporation; Chicago & Northwestern Railway Company, a corporation; The Chicago, Rock Island & Pacific Railway Company, a corporation, and J. M. Dickinson, as Receiver thereof; Boston & Albany Railroad Company, a corporation; Union Pacific Railroad Company, a corporation; Oregon Short Line Railroad Company, a corporation; Oregon-Washington Railroad & Navigation Company, a corporation,

Plaintiffs in Error,

vs.

Ballou & Wright, a corporation,

Defendant in Error.

Reply Brief of Counsel for Plaintiffs in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

This case was argued and submitted to the Court October 24, 1916. The brief of counsel

for the defendant in error was served October 23, 1916. For this reason it became necessary for the plaintiff in error to reserve time within which to reply to the contentions of the defendant in error, in so far as its brief has raised new questions or reasons for the affirmance of the judgment of the court below.

THE CLAIM OF DEFENDANT IN ERROR THAT ABATEMENT OF DAMAGES CANNOT BE HAD ON THE PRINCIPLE OF COMPENSATION RECEIVED FOR LOSS OR INJURY, FROM A COLLATERAL SOURCE INDEPENDENT OF THE PARTY CAUSING THE DAMAGES, HAS NO APPLICATION TO THIS CASE.

On page 19 *et seq.* of counsel's brief, the point is made that the doctrine applied in certain insurance and negligence cases, whereby a *tort feasor* is foreclosed from pleading in defense of its wrongdoing, that a plaintiff has been compensated by certain insurance money recovered and the like, is controlling.

These cases, and the principles supported by them, have no application to the case at bar. If there was a statute in terms permitting the recovery by a shipper from a carrier of the difference between a published and filed rate, which the Commission had found unreasonable, and a rate which the Commission found to be reasonable, then it might be argued with some degree of analogy that the carrier could not in defense of such action be heard to say that the shipper had received such or similar money from his customer. But there is no such statute. The Act to

Regulate Commerce does not contemplate such recovery. We are certainly justified in the assertion that if such was the intention of the Congress, apt words so indicating would have been used. In place of declaring, as it did in Section 8 of the Act to Regulate Commerce, that the carrier shall be liable not to the shipper but to the person or persons "injured thereby" for the damages sustained in consequence of any violation, the Congress would have said in apt words and of clear import, that the shipper, whenever a rate is found unreasonable, shall be allowed to recover the difference between such rate and a rate fixed by the Commission as reasonable. The very fact that the Congress did not so enact, is persuasive evidence that it did not so intend. The liability arising from the collection of an excessive rate is not to return such excess, but to pay damages. In this respect the case is to be distinguished from those referred to by counsel in their brief at page 19.

The elements which constitute a cause of action, as the phrase is used in the law, is probably best stated by Mr. Pomeroy in his "Remedies and Remedial Rights," Par. 3 c, 3, and also section 518, and 519, wherein Mr. Pomeroy says:

> "The cause of action, therefore, must always consist of two factors: the plaintiff's primary right and the defendant's corresponding primary duty, whatever be the subject to which they relate, person, character, property or contract; and the delict or wrongful act or omission of the defendant, by which the primary right and duty have

been violated. Every action, when analyzed, will be found to contain these two combinations. They constitute the cause of action." See also

Patterson v. Wold, 33 Fed. 791.

Take the case of Regan v. New York & New England R. R. Co., 60 Conn. 124, quoted and referred to on page 20 of the brief of the defendant in error. It is there said that this action was an action to recover damages for the loss of goods belonging to plaintiff, which were destroyed by a fire communicated by a locomotive belonging to and in the use of the defendant corporation.

Applying Mr. Pomeroy's definition of a cause of action to that case, it will be found that the plaintiff's primary right was to the ownership, possesion and enjoyment of the goods, the subject of the action. The defendant's corresponding primary duty was to so operate its railroad as to not interfere with the plaintiff in his ownership and possession of such goods. The delict or wrongful act of the defendant was the negligent destruction of such goods. It was this delict by which the plaintiff's primary right and duty was violated. And the Court very properly held in the Regan case that the fact that he had received insurance was not material to such cause of action or defense.

Now, in the case at bar the cause of action is entirely dissimilar. It is not for the specific goods destroyed, or to state it differently, it is not for the recovery of the specific funds paid out. The cause of action, that is, the plaintiff's primary right, is to have the defendant continue

its transportation business in accordance with the Act to Regulate Commerce. The defendant's corresponding primary duty is to comply with the Act to Regulate Commerce. The delict or wrongful act or omission of the carrier is the violation of that Act, whereby a recovery is granted for "the full amount of damages sustained in consequence of any such violation, etc."

To restate the application of Mr. Pomeroy's rule, we assert that the primary right of the plaintiff in error is to continue its business of distributing motorcycles in a manner free from injury by the carrier. The corresponding primary duty of the railroad companies is to refrain from violating any of the provisions of the Act to Regulate Commerce whereby the person injured is allowed to recover damages. The delict or wrongful act or omission of the carriers in this case was the violation of Section 8 in that such common carriers did or caused to be done an "Act, matter or thing in this act prohibited or declared to be unlawful."

(The words above quoted are from Sec. 8 of the Act to Regulate Commerce.)

Now, the plaintiffs in error maintain that without Section 8 there could be no recovery, and that the recovery of damages is not recovery of the difference between the rate found reasonable and the rate held unreasonable, but it is for damages resulting from the commercial effect of the assessment and collection of the tariff on the business activities of the defendant in error, and that when we show that it has had no appreciable commercial effect upon those business activities,

we have answered the claim of damages not by saying that you have secured your excess freight money from some other source, but that in the business of receiving from the manufacturer and delivering to the consumer motorcycles on which you paid a freight, you have been enabled to conduct that business in a way which fully discloses the business to have been undamaged.

What is the business of Ballou & Wright which is afforded the protection of Section 8 of the Act to Regulate Commerce in declaring a liability for damages sustained in consequence of the violation of any of the provisions of the Act to Regulate Commerce? It is not limited to the Act of paying over the counter of the carrier's freight house fifteen dollars freight on a motorcycle or any multiple thereof. Ballou & Wright's business is far greater and more extensive. That feature is but a small item. Ballou & Wright are distributors of motorcycles in certain limited trade areas. They are possessed of the right to buy and distribute in that area of all the motorcycles the trade will take. In exercising that right to so distribute machines we find that the machine is manufactured and placed upon the cars, transported to Portland, Oregon, sold to a consumer, delivered to him and taken out of the warehouse or storehouse of Ballou & Wright, and $265 to $300, whatever may be the price, is placed into the treasury of Ballou & Wright. In all these transactions there are contained in the $265 or $300 various elements:

(a) The manufacturer's cost and profit.
(b) The transportation cost and profit.
(c) The distributor's profit.

Now, the testimony shows that the items "a" and "b" have not reduced in the slightest degree item " c," but that all have been included in the final transaction of a single item of business of Messrs. Ballou & Wright.

Now, we contend that in such situation Ballou & Wright have not been damaged, and that to adopt the principle contended for on page 19 *et seq.* of the brief of defendant in error would be to pervert the purpose for which the statute was enacted and would permit any intermediate shipper between the manufacturer and the consumer to make exactly the same recovery that Ballou & Wright claim, if any there be.

It is not every case wherein there is one intermediate delivery between the manufacturer and consumer as in the case of Ballou & Wright. The manufacturer at Armory, Massachusetts, may well sell to a jobber in Armory. The jobber in Armory may sell to à dealer in New York and the dealer in New York to another at Chicago, and so on, until the freight paid would merely be the locals applicable between such points, and which local rates from Armory to Portland would exceed the through rate.

Now, would it be contended that the recovery would be the difference between the amount of the sum of these local rates and the rate fixed by the Commission as reasonable. If not, why not, if the theory of the defendant in error is correct.

We contend that the damages recoverable under the Act to Regulate Commerce, or any particu-

lar section thereof, must be those which naturally flow from the transaction, and may be in favor of the manufacturer who was prevented by an excessive rate from extending a trade area, or from competing with a manufacturer whose factory was more favorably situated. It may be a distributor whose business has been affected injuriously by the rate; it may be a consumer who has been compelled to pay an excessive price for a given article which he otherwise would not have been compelled to pay, and that such recovery is not centered in or limited to the man who in the first instance draws his check in favor of the railroad company for the freight.

It may well be that Congress could have enacted a statute which would permit a shipper who had paid a rate subsequently found to be unreasonable, to recover the difference between such rate and the rate found reasonable, but it is a sufficient answer to the claim for such recovery that Congress has not so enacted. For these reasons we contend that the principle laid down by the insurance-negligence cases cited in the brief of the defendant in error are neither controlling, persuasive nor applicable.

DEFENDANT IN ERROR CLAIMS THAT BECAUSE THE FREIGHT WAS "PASSED ALONG" THE CARRIER IS NOT IN A POSITION TO CLAIM ANY BENEFIT BECAUSE THE SHIPPER HAS BEEN FULLY REIMBURSED.

Amplifying this contention and restating it, it is tantamount to a proposition that although they have so transacted their business whereby they

have not been damaged and whereby they have received the excess freight complained of from the consumer, that they are entitled also to recover the same amount again from the carrier.

C. F. Wright testified before the Interstate Commerce Commission (Transcript of Record p. 162) that the freight charges were paid upon these shipments by Ballou & Wright, and they were not charged back to the shipper. The point to be made from the testimony, that the freight charges were not charged back to the shipper, is that the consignor would not thereby have the right of action.

We submit that if the failure to charge the freight back to the shipper (consignor) cuts the consignor out of the cause of action under Section 8 of the Act to Regulate Commerce, why does not the charging of such freight forward to the purchaser also cut the consignee out of his right of action.

In the case of

Darnell-Taenzer Lumber Co. v. Southern Pacific, 221 Fed. Rep. 890,

the consignee charged the freight back to the lumber company, its consignor, and the lumber company by reason of that fact brought the action against the Southern Pacific, seeking to recover on account of all shipments for which such freight was charged back to them by the shipper.

If charging back the freight disposes of the cause of action of such consignee, we submit that by the same token and upon the same principle

of common justice to charge it forward accomplishes the same result.

UPON THE ARGUMENT, COUNSEL FOR DEFENDANT IN ERROR ADMITTED THAT DAMAGES RECOVERABLE UNDER SECTION 8 OF THE ACT TO REGULATE COMMERCE WAS NOT NECESSARILY MEASURED BY THE DIFFERENCE BETWEEN THE TWO RATES BY ASSERTING THAT SUCH DAMAGES MIGHT BE MORE THAN THE DIFFERENCE, BUT THEY CONTENDED THAT THE DAMAGES WOULD BE AT LEAST EQUAL TO SUCH DIFFERENCE.

We submit that the foregoing proposition is fatal to a contention that the measure of the damage is such difference. To restate the proposition in the reverse, if such damages may be more than such difference, it must follow that in certain cases it may be less. Furthermore, if such damages are more than the difference between such rates, how can the damages be so measured? It is submitted that the moment the defendant in error conceded that its damages in a given case might be more than the difference between the two rates multiplied by the quantity of the shipment, that they must also admit that no proper legal rule of measure was adopted by the trial court.

The argument of the defendant in error that the carriers are attempting to reduce the damages by showing Ballou & Wright passed along the excessive freight charges is fundamentally erroneous. We make no such contention. We say the damages if any which Ballou & Wright are entitled to recover are such that flow from the

commercial effect which the assessment and collection of the published rate had upon their business activities, and we offer the testimony that the freight was recollected by them, together with other and additional testimony; the sum total of which justifies the finding that they were not damaged, and hence cannot recover.

THE POINT WAS MADE THAT THE RAILWAY COMPANIES HAD CITED NO AUTHORITIES BUT THOSE ARISING FROM DISCRIMINATION CASES, AND ATTEMPT TO ANSWER OUR CONTENTION BY SAYING THAT THE COURTS OF LAST RESORT HAVE HELD THE RULE AS TO THE MEASURE OF DAMAGES IN DISCRIMINATION CASES AND EXCESSIVE RATE CASES, IS NOT NECESSARILY THE SAME.

It is true we have not cited a decision of the Supreme Court of the United States for the very simple reason that there is none, but we think our contention is impliedly adopted by the Supreme Court of the United States in the Meeker case.

When the case of Lehigh Valley R. R. Company v. Meeker was before the Circuit Court of Appeals, 211 Federal, that Court said at page 801:

> "The Supreme Court also distinctly decides (speaking of the International Coal case) that, in the absence of proof of actual damage to that extent, the amount of the rebate charged and proved to have been made by defendant, cannot be recovered as damages, and that it can never be made the measure of the damage to which plaintiff is entitled.

No more in this case can the difference between what is found by the Commission to be the unreasonable tariff rate and that fixed as a reasonable one, be made the measure of the damage that the plaintiff has suffered."

Now, the Supreme Court reversed this case on another point, 236 U. S. 412. We assert that a proper reading of the opinion of the Supreme Court of the United States in the Meeker case is an endorsement of the proposition laid down by the Circuit Court of Appeals to the effect, namely:

> "No more in this case can the difference between what is found by the Commission to be the unreasonable tariff rate and that fixed as a reasonable one, be made the measure of the damage that the plaintiff has suffered."

and the failure of the Supreme Court in reversing the case to disapprove of this doctrine amounts to an implied approval of the correctness thereof. In any event, we are left with the authority of the Circuit Court of Appeals for the Third Circuit as approving the doctrine we are contending for in this case. Moreover, the opinion of Judge McCall on demurrer to complaint in Darnell-Taenzer Lumber Company v. Southern Pacific, 190 Fed. p. 659 is a recognition of the correctness of this principle.

Mr. Justice Van DeVanter in the case of Meeker v. Lehigh Valley recognized the validity of our contention that the proof must support and the award represent the claimant's actual, pecuniary loss when he said in respect to the report of the Commission before the court in the Meeker case:

> "The plain import of the findings is that the amounts expended represent the claimant's actual, pecuniary loss."

(See page 429). On the contrary, in this case the Commission does not nor does the lower court, nor does the counsel for the defendant in error claim that the amounts awarded represent Ballou & Wright's actual pecuniary loss. In fact, it was argued before this court at the oral hearing, that such pecuniary loss might be more, but that it was at least equal to the award of the Commission.

The difference between the contentions of the carriers and that of the Commission and of counsel is marked and wide. The position of the Commission in the case at bar is that as a matter of law, even though the proof shows that the plaintiffs have shifted the burden of the excess to others, and, therefore, have not suffered any actual, pecuniary damage, yet the plaintiff in the court below was entitled to recover as a matter of law the difference between the rate found to be unreasonable by the Commission and the rate as finally fixed by such body.

The plain import of the findings in this case in the light of the evidence before the Commission and before the Court, is that the amount awarded does not represent the claimant's actual pecuniary loss, and that the damages are to be measured in some other way than that adopted in this case in ascertaining such loss.

The Circuit Court of Appeals for the Third Circuit, in passing on the Meeker case was certainly preeminently correct in declaring that

proof of actual damage was just as necessary in unreasonably excessive rate cases as it was in discrimination cases, and that such difference between what is found by the Commission to be the unreasonable tariff rate and that fixed as a reasonable one, could not be made the measure of damage in one any more than in the other.

The argument that the Interstate Commerce Commission has adopted the measure approved by the court below and the citation of such adoption as persuasive authority and its approval in this court is not admissible, for that view is the subject of direct attack in this case.

On page 29 of respondent's brief a number of decisions of the Interstate Commerce Commission have been cited and a quotation is made from the case of Burgess v. Transcontinental Freight Bureau, 13 I. C. C. 668, and others. Stress is laid upon the argument of the Commission, that

> "If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them."

and for that reason they have undertaken to find a method of arriving at a damage notwithstanding such impossibility. The argument if unsound in one particular is certainly invalid in all.

The Supreme Court of the United States in the International case has disapproved of the proposition that because it was impossible to prove

damage that its recovery should be permitted anyhow. Even the Interstate Commerce Commission in speaking of such uncertainty of purpose in reparation cases, had this to say:

> "An award of the Commission in reparation of damages resulting from a violation of the act to regulate commerce is not enforceable as such, but in a suit in court for such damages the findings and order of the Commission are *prima facie* evidence in support thereof. It follows that the Commission is not justified in awarding damages in any case except on a basis as certain and definite in law and in fact as is essential to the support of a final judgment or decree requiring the payment of a deifnite sum of money by one party to another."
>
> *Anadarko Cotton Oil Co. v. A., T. & S. F. Ry. Co.*, 20 I. C. C. Rep. 43, 49.

No fault can be found with this principle. The award of damages should be made in no case except upon proof as certain and definite as would be required to support a final judgment or decree. The method adopted by the lower court is artificial and fictional and does not comply with such rule.

If, as counsel for defendant in error said at the argument, the damages suffered by his client may be more than that ascertained by the method adopted by the lower court, how can it be said that a complete measure has been applied in this case. In other words, the lower court has adopted a rule which fails to do complete justice. The rule is erroneous by the very fact of its failure to

fully measure the potential damage. Assuming there was testimony to prove such pecuniary loss, we have established its erroneous character. The testimony as was said in the Anadarko Cotton Oil case should be certain and definite to the extent required in support of a judgment at law.

The rule adopted by the lower court in the instant case fails to produce such certainty. There was neither proof nor measure of the actual pecuniary loss suffered by the defendant in error. On the other hand the affirmative testimony of the defendant disclosed it to have suffered no damage.

THERE SHOULD BE NO ADDITIONAL ATTORNEY'S FEES ALLOWED.

Ordinarily, we would not take exception to the allowance of attorney's fees in a proper case nor to the amount of the same. The decisions quoted on page 40 of counsel's brief appear to sustain the point contended for. In one of them additional attorney's fees were allowed in the Appellate Court, while in the other they were allowed in the *nisi prius* court. The amount involved in this case is between nine hundred and one thousand dollars. The lower court allowed five hundred dollars as attorney's fees and we made no contention on that point. We feel certain, however, that the attorney's fees allowed by the lower court were allowed in the sum of five hundred dollars on the theory that the case was going to be appealed, and that five hundred dollars would be indirectly compensation in the Cir-

cuit Court of Appeals. The bill of exceptions recites the following (Trans. 103):

> "In addition to a consideration of the order of the Interstate Commerce Commission and the decision awarding reparation pleaded in the petition and admitted by the railroad companies to have been rendered, the petitioner offered the testimony of Mr. C. W. Fulton and Mr. Samuel White, attorneys of considerable and extended experience, whose testimony tended to show that a reasonable attorney's fee, *in the event that petitioner should prevail,* was the sum of five hundred dollars ($500.00). The petitioner then rested its case."

The words of the statute under which attorney's fees have been taxed are found in Section 16 of the Act and read as follows:

> "If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fees to be taxed and collected as a part of the costs of the suit."

We oppose the allowance of any additional attorney's fees on two grounds:

1. There is no testimony in this record upon which the Court of Appeals can base a finding as to what would be a reasonable attorney's fee.

2. The attorney's fee already allowed by the lower court was based upon testimony tending to show that sum a reasonable amount "in the event that petitioner should prevail."

The difference between the statute and the bill of exceptions is that the statute contains the word "finally." So take it altogether we assert that the compensation of attorneys if the event arises calling for the taxation of costs is handsomely fixed by the court below in a sum sufficient to compensate for the volume of work and labor done.

Respectfully submitted,

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